

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Jul 27, 2020

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

WILLIAM B.,

Plaintiff,

v.

ANDREW M. SAUL,
COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No. 2:19-CV-00261-JTR

ORDER GRANTING IN PART
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT AND
REMANDING FOR ADDITIONAL
PROCEEDINGS

BEFORE THE COURT are cross-motions for summary judgment. ECF No. 13, 17. Attorney Rosemary Schurman represents William B. (Plaintiff); Special Assistant United States Attorney Jacob Peter Phillips represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 6. After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS IN PART** Plaintiff's Motion for Summary Judgment; **DENIES** Defendant's Motion for Summary Judgment; and **REMANDS** the matter to the Commissioner for additional proceedings pursuant to 42 U.S.C. § 405(g).

JURISDICTION

Plaintiff filed an application for Supplemental Security Income on September 15, 2017, alleging disability since January 23, 2008,¹ due to schizophrenia and bipolar disorder. Tr. 72. The application was denied initially and upon reconsideration. Tr. 96-99, 103-05. Administrative Law Judge (ALJ) Moira Ausems held a hearing on March 27, 2019, Tr. 30-70, and issued an unfavorable decision on April 23, 2019, Tr. 15-24. Plaintiff requested review of the ALJ's decision from the Appeals Council. Tr. 169, 254-59. The Appeals Council denied the request for review on June 12, 2019. Tr. 1-6. The ALJ's April 2019 decision is the final decision of the Commissioner, which is appealable to the district court pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action for judicial review on July 26, 2019. ECF No. 1.

STATEMENT OF FACTS

Plaintiff was born in 1984 and was 33 years old as of the filing of his application. Tr. 23. He had a traumatic childhood, including being abused by his alcoholic mother and the death of his brother. Tr. 265, 291, 364. Plaintiff spent time living with his grandparents, in foster care, and in juvenile detention. Tr. 266, 291, 364. He dropped out of school and completed his GED. Tr. 266, 292, 364. In 2009 his infant daughter died from SIDS. Tr. 265, 291, 389. He has a minimal work history, with no job lasting longer than a few months. Tr. 266, 292, 365. He has been incarcerated or homeless for much of his adult life, living in the woods in order to stay away from other people. Tr. 41, 53, 227, 332, 334, 356, 441, 544.

STANDARD OF REVIEW

The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,

¹ Plaintiff later amended his alleged onset date to the date of filing of his application. Tr. 33.

1 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed *de novo*, with
 2 deference to a reasonable interpretation of the applicable statutes. *McNatt v. Apfel*,
 3 201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed
 4 only if it is not supported by substantial evidence or if it is based on legal error.
 5 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is
 6 defined as being more than a mere scintilla, but less than a preponderance. *Id.* at
 7 1098. Put another way, substantial evidence is such relevant evidence as a
 8 reasonable mind might accept as adequate to support a conclusion. *Richardson v.*
 9 *Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to more than one
 10 rational interpretation, the Court may not substitute its judgment for that of the
 11 ALJ. *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of Social Sec. Admin.*,
 12 169 F.3d 595, 599 (9th Cir. 1999). If substantial evidence supports the
 13 administrative findings, or if conflicting evidence supports a finding of either
 14 disability or non-disability, the ALJ's determination is conclusive. *Sprague v.*
 15 *Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987). Nevertheless, a decision
 16 supported by substantial evidence will be set aside if the proper legal standards
 17 were not applied in weighing the evidence and making the decision. *Browner v.*
 18 *Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

19 SEQUENTIAL EVALUATION PROCESS

20 The Commissioner has established a five-step sequential evaluation process
 21 for determining whether a person is disabled. 20 C.F.R. § 416.920(a); *Bowen v.*
 22 *Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one through four, the burden of
 23 proof rests upon the claimant to establish a prima facie case of entitlement to
 24 disability benefits. *Tackett*, 180 F.3d at 1098-1099. This burden is met once a
 25 claimant establishes that a physical or mental impairment prevents the claimant
 26 from engaging in past relevant work. 20 C.F.R. § 416.920(a)(4). If a claimant
 27 cannot perform past relevant work, the ALJ proceeds to step five, and the burden
 28 shifts to the Commissioner to show (1) the claimant can make an adjustment to

1 other work; and (2) the claimant can perform specific jobs that exist in the national
2 economy. *Batson v. Commissioner of Social Sec. Admin.*, 359 F.3d 1190, 1193-
3 1194 (2004). If a claimant cannot make an adjustment to other work in the national
4 economy, the claimant will be found disabled. 20 C.F.R. § 416.920(a)(4)(v).

5 ADMINISTRATIVE DECISION

6 On April 23, 2019, the ALJ issued a decision finding Plaintiff was not
7 disabled as defined in the Social Security Act. Tr. 15-24.

8 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
9 activity since the application date. Tr. 17.

10 At step two, the ALJ determined Plaintiff had the following severe
11 impairments: bipolar disorder, antisocial personality disorder, attention deficit
12 hyperactivity disorder, post-traumatic stress disorder, and history of polysubstance
13 abuse disorder in full sustained remission with the exception of cannabis use
14 disorder. *Id.*

15 At step three, the ALJ found Plaintiff did not have an impairment or
16 combination of impairments that met or medically equaled the severity of one of
17 the listed impairments. Tr. 19-20.

18 The ALJ assessed Plaintiff's Residual Functional Capacity (RFC) and found
19 he could perform work at all exertional levels, but he was limited to work that:

20 does not require the performance of more than simple routine tasks or
21 tasks that have high quotas or fast-paced production requirements, and
22 that do not involve more than occasional brief superficial interaction
23 with the general public or require more than infrequent adaptation to
24 unforeseen changes.

25 Tr. 20.

26 At step four, the ALJ found Plaintiff had no past relevant work. Tr. 23.

27 At step five, the ALJ found that, considering Plaintiff's age, education, work
28 experience and residual functional capacity, there were jobs that existed in

1 significant numbers in the national economy that Plaintiff could perform,
2 specifically identifying the representative occupations of housekeeping cleaner,
3 cafeteria attendant, and dining room attendant. Tr. 23. The ALJ alternatively found
4 that, even if Plaintiff were further limited to work with no public contact, there
5 would still be jobs that he could perform, including cannery worker and price
6 marker. Tr. 23-24.

7 The ALJ thus concluded Plaintiff was not under a disability within the
8 meaning of the Social Security Act at any time from the date the application was
9 filed through the date of the decision. Tr. 24.

10 ISSUES

11 The question presented is whether substantial evidence supports the ALJ's
12 decision denying benefits and, if so, whether that decision is based on proper legal
13 standards.

14 Plaintiff contends the Commissioner erred by (1) improperly assessing the
15 medical opinions; and (2) making RFC findings and step five findings that are
16 contrary to law and fact.

17 DISCUSSION

18 1. Medical opinion evidence

19 Plaintiff contends the ALJ erred by improperly assessing the medical
20 opinions. Specifically, he asserts the ALJ erred in rejecting consistent opinions
21 from multiple providers which were supported by the record as a whole. ECF No.
22 13 at 5.

23 For claims filed on or after March 27, 2017, new regulations apply that
24 change the framework for how an ALJ must weigh medical opinion evidence.
25 *Revisions to Rules Regarding the Evaluation of Medical Evidence*, 2017 WL
26 168819, 82 Fed. Reg. 5844 (Jan. 18, 2017); 20 C.F.R. § 416.920c. The new
27 regulations provide the ALJ will no longer give any specific evidentiary weight to
28 medical opinions or prior administrative medical findings, including those from

1 treating medical sources. 20 C.F.R. § 416.920c(a). Instead, the ALJ will consider
 2 the persuasiveness of each medical opinion and prior administrative medical
 3 finding, regardless of whether the medical source is an Acceptable Medical Source.
 4 20 C.F.R. § 416.920c(c). The ALJ is required to consider multiple factors,
 5 including supportability, consistency, the source's relationship with the claimant,
 6 any specialization of the source, and other factors (such as the source's familiarity
 7 with other evidence in the file or an understanding of Social Security's disability
 8 program). *Id.* The regulations make clear that the supportability and consistency of
 9 the opinion are the most important factors, and the ALJ must articulate how she
 10 considered those factors in determining the persuasiveness of each medical opinion
 11 or prior administrative medical finding. 20 C.F.R. § 416.920a(b). The ALJ may
 12 explain how she considered the other factors, but is not required to do so, except in
 13 cases where two or more opinions are equally well-supported and consistent with
 14 the record. *Id.*²

15 Supportability and consistency are further explained in the regulations:

16 (1) *Supportability*. The more relevant the objective medical evidence
 17 and supporting explanations presented by a medical source are to
 18 support his or her medical opinion(s) or prior administrative medical
 19 finding(s), the more persuasive the medical opinions or prior
 20 administrative medical finding(s) will be.

21 (2) *Consistency*. The more consistent a medical opinion(s) or prior
 22 administrative medical finding(s) is with the evidence from other

23 ² The parties disagree over whether Ninth Circuit case law continues to be
 24 controlling in light of the amended regulations, specifically whether an ALJ is still
 25 required to provide specific and legitimate reasons for discounting a contradicted
 26 opinion from a treating or examining physician. ECF No. 13 at 6-7; ECF No. 17 at
 27 2-9. The Court finds resolution of this question unnecessary to the disposition of
 28 this case.

1 medical sources and nonmedical sources in the claim, the more
2 persuasive the medical opinion(s) or prior administrative medical
3 finding(s) will be.

4 20 C.F.R. § 416.920c(c).

5 *a. Dr. Islam-Zwart*

6 Plaintiff attended a consultative psychological exam with Dr. Kayleen
7 Islam-Zwart for the Department of Social and Health Services, in August 2017. Tr.
8 260-68. Dr. Islam-Zwart diagnosed Plaintiff with antisocial personality disorder,
9 ADHD, PTSD, unspecified bipolar disorder, and marijuana use disorder. Tr. 261.
10 She opined Plaintiff had marked limitations in handling detailed instructions,
11 performing within a schedule, maintaining regular attendance, being punctual,
12 communicating and performing effectively, maintaining appropriate behavior, and
13 completing a normal workweek. Tr. 261.

14 The ALJ accorded this opinion “no significant probative value.” She found
15 the opinion was “without support from her narrative report,” and was inconsistent
16 with her own objective findings as well as the longitudinal medical record, which
17 the ALJ found did not document marked limitations. Tr. 22. The ALJ also found
18 Dr. Islam-Zwart’s comments regarding Plaintiff’s limited work history and history
19 of incarceration to be beyond the limitations caused by his severe impairments. *Id.*

20 The Court finds the ALJ’s analysis is not supported by substantial evidence.
21 With respect to supportability, the ALJ’s discussion of Dr. Islam-Zwart’s opinion
22 omits several findings that were supportive of her opinion, such as her observations
23 that Plaintiff was constantly moving and restless, distractible, struggled with focus,
24 and did not wait for instructions to be completed. Tr. 266-67. The Ninth Circuit has
25 noted that psychiatric reports may appear subjective due to the relative imprecision
26 of psychiatric methodology. *Buck v. Berryhill*, 869 F.3d 1040, 1049 (9th Cir.
27 2017). Simply because Plaintiff did well on portions of the mental status exam
28

1 does not negate the other abnormal findings, as well as Dr. Islam-Zwart's
2 professional assessments.

3 The ALJ also took two comments in the report out of context. The ALJ
4 found Dr. Islam-Zwart's reflection on Plaintiff's work history and incarceration to
5 be beyond the limitations caused by Plaintiff's mental impairments. Tr. 22.
6 However, the greater context of the paragraph indicates the doctor was listing these
7 factors as examples of his long history of mood disorder and acting out behaviors.
8 Tr. 267. This formulation is supported by another note that indicates chronic
9 engagement in illegal activity and an inability to sustain consistent work are
10 symptoms of his antisocial personality disorder. Tr. 379. The ALJ also took issue
11 with Dr. Islam-Zwart's finding that Plaintiff indicated difficulty interacting with
12 others despite a page earlier noting he reported to be good at socializing. Tr. 22.
13 The ALJ failed to recount the entire sentence, which reads "He notes that he is
14 good at socializing, *but does not really like to interact with people.*" Tr. 266
15 (emphasis added). The report also documents Plaintiff's problems interacting with
16 others without violence and difficulty controlling his anger. Tr. 264-66. The ALJ's
17 interpretation of the report as being internally inconsistent or unsupported is not
18 supported by substantial evidence.

19 With respect to consistency, the ALJ failed to discuss the medical opinion's
20 consistency with the rest of the record with any specificity. Tr. 22. The ALJ stated
21 only that the opinion was inconsistent with "the longitudinal medical record, which
22 does not document marked limitations." *Id.* On the previous page of the decision
23 the ALJ noted objective mental status findings that were "largely normal or
24 essentially benign." Tr. 21. However, many of these citations, while including
25 some normal findings, also include abnormal findings. Tr. 294-95 (depressed
26 mood, weak performance on abstract thought and reasoning, insight and judgment
27 outside of normal limits); 279-80 (noting Plaintiff presented as lethargic, guarded,
28 suspicious, rigid, and tense, with rambling speech, poor comprehension, and

1 tangential/slowed/black and white thoughts); 315 (Plaintiff presenting as fully
2 oriented, but agitated, angry, threatening, combative, and disheveled); 326 (normal
3 mood and fully oriented, but with mildly impaired concentration, judgement, and
4 insight). The ALJ's citation to normal mental status exams during Plaintiff's
5 treatment in the final months leading up to the hearing omits reference to treatment
6 notes where Plaintiff was furious with his treatment providers and cursed at them,
7 stormed out of sessions, and made threats of violence. Tr. 432, 436-37, 441-43,
8 548. While ALJs obviously must rely on examples to support their findings, the
9 data points they choose must in fact constitute examples of a broader development.
10 *Garrison v. Colvin*, 759 F.3d 995, 1018 (9th Cir. 2014). The Court finds the ALJ's
11 examples do not reflect the record as a whole, which shows repeated instances of
12 Plaintiff's aggression, delusions, difficulty concentrating, and suicidal ideation. Tr.
13 227, 328, 334, 336-37, 356, 365-66, 373-74, 432, 436-37, 441-43, 543, 548.

14 Defendant argues the record reflects objective findings throughout that
15 Plaintiff was cooperative and communicated effectively with normal speech, in
16 contrast to Dr. Islam-Zwart's opinion that he had marked limitations in
17 communicating and maintaining appropriate behavior. ECF No. 17 at 12-13.
18 However, the ALJ did not invoke these factors in the context of evaluating Dr.
19 Islam-Zwart's opinion. Tr. 22. The Court is constrained to review only the reasons
20 provided by the ALJ and may not affirm on a ground upon which the ALJ did not
21 rely. *Orn v. Astru*, 495 F.3d 625, 630 (9th Cir. 2007).

22 Finally, the ALJ did not discuss the consistency between Dr. Islam-Zwart's
23 opinion and various other disabling opinions in the file, including Dr. Burdge's
24 assessment agreeing with Dr. Islam-Zwart's opinion and finding it supported by
25 the available medical evidence. Tr. 307.

26 The Court therefore finds the ALJ failed to adequately evaluate Dr. Islam-
27 Zwart's opinion in terms of its consistency and supportability, as required by the
28 regulations.

1 *b. Dr. Burdge*

2 Following Dr. Islam-Zwart's consultative exam, Dr. Aaron Burdge reviewed
3 the available medical evidence for the Department of Social and Health Services.
4 Tr. 307. He reviewed three medical reports from 2008 to 2017. *Id.* He concluded
5 the diagnoses and functional limitations in Dr. Islam-Zwart's opinion were
6 supported by the available objective medical evidence. *Id.*

7 The ALJ gave no significant probative value to this eligibility determination,
8 noting that Dr. Burdge "had the opportunity to review only a small portion of the
9 medical evidence of record" and had relied on evaluations from well before the
10 adjudicative period. Tr. 22.

11 While a source's familiarity with the other evidence in the claim is a factor
12 the ALJ may consider (20 C.F.R. § 416.920c(c)(5)), it is not the most relevant
13 factor. The ALJ failed to articulate how she considered the most relevant factors
14 of supportability and consistency, as required by the statute. 20 C.F.R. §
15 416.920c(b). Defendant argues that because Dr. Burdge reviewed only Dr. Islam-
16 Zwart's opinion (which was sufficiently discounted) and evidence that pre-dated
17 the alleged onset date, the opinion was neither well-supported nor consistent with
18 the record. ECF No. 17 at 13-14. However, the ALJ did not rely on this rationale.
19 Furthermore, the Court finds the ALJ did not adequately discuss Dr. Islam-Zwart's
20 opinion. Therefore, the ALJ erred.

21 *c. MHLG Grey*

22 Plaintiff's treating counselor, Sa'ovale Grey, completed a medical source
23 statement in November 2018. Tr. 445-47. She opined Plaintiff was markedly
24 impaired in understanding and remembering simple instructions and interacting
25 appropriately with the public, and moderately impaired in understanding and
26 remembering complex instructions and carrying out instructions. Tr. 445-46. She
27 noted that Plaintiff had only met with her agency three times, but had demonstrated
28

1 deficiencies in following and/or completing tasks due to his symptoms of PTSD
2 and schizoaffective disorder. Tr. 446.

3 The ALJ accorded no significant probative weight to this opinion. Tr. 22.
4 The ALJ found the opinion to be unsupported by sufficient objective evidence as
5 Ms. Grey had only recently begun treating Plaintiff, and the ALJ found Ms. Grey's
6 treatment notes to be generally inconsistent with the opinion. *Id.*

7 While the ALJ offered sufficient analysis of the supportability factor, she
8 failed to articulate how she considered Ms. Grey's opinion in terms of consistency
9 with the evidence from other medical and nonmedical sources, as required by the
10 revised regulations. 20 C.F.R. § 416.920c(b). Therefore, the ALJ erred.

11 *d. State agency doctors*

12 On initial and reconsideration review, state agency doctors offered their
13 opinions regarding Plaintiff's functional abilities. Tr. 79-80, 90-92. They found
14 Plaintiff was capable of simple tasks, and could handle routine social interaction
15 with brief repetitive interactions with the public. *Id.* They found he would work
16 best in a stable, low-pressure setting. *Id.*

17 The ALJ found these opinions had significant probative value, finding them
18 supported by the longitudinal medical record documenting generally moderate
19 limitations, and consistent with the findings on mental status examinations
20 throughout the period. Tr. 22.

21 As this claim is being remanded for further consideration of the
22 persuasiveness of other evidence in the file, the ALJ shall also reconsider the state
23 agency doctors' findings and address their supportability and consistency with
24 other evidence in the record.

25 *e. Dr. Brown and Dr. Neims*

26 Plaintiff attended two previous evaluations for the Department of Social and
27 Health Services, in 2008 and 2014. Tr. 272-90, 291-97. The ALJ found each
28 opinion was "too remote in time to be of any significant evidentiary value in

1 assessing the claimant's functioning from September 15, 2017, the application
2 date, to the present." Tr. 22.

3 Plaintiff acknowledges that while remote evidence is often not considered
4 relevant, in this case the opinions are consistent with the later evidence and support
5 the notion that Plaintiff's impairments are long-standing and will interfere with his
6 ability to work. ECF No. 13 at 17.

7 Medical opinions that predate the alleged onset of disability are of limited
8 relevance. *See Fair v. Bowen*, 885 F.2d 597, 600 (9th Cir.1989). Therefore, the
9 ALJ did not err in disregarding this evidence.³

10 **2. RFC and step five findings**

11 Plaintiff argues that the RFC finding and subsequent job findings at step 5
12 are flawed due to the ALJ's improper disregard of the medical evidence. ECF No.
13 13 at 18-19. As this claim is being remanded for further evaluation of the medical
14 evidence, the ALJ will be required to reassess the RFC and subsequent steps of the
15 sequential evaluation process.

16 **CONCLUSION**

17 Plaintiff argues the decision should be reversed and remanded for the
18 payment of benefits, as the record is fully developed and there are no further issues
19 to resolve. Defendant argues numerous conflicts exist among the various medical
20 opinions and other evidence precludes crediting any of the opinions as true.

21 The Court notes that the commentary to the revised regulations specifically
22 indicates that the intent in the new rules was "to make it clear that it is never
23 appropriate under our rules to 'credit-as-true' any medical opinion." *Revisions to*
24

25 ³ The Court notes that the ALJ did cite to these opinions in finding mental
26 status exams to be largely normal or benign through the adjudicative period. Tr. 21
27 (citing to Exhibits 1F/20-21, 1F/35-36). On remand, the Court urges the ALJ to be
28 consistent as to whether this evidence has probative value or not.

1 *Rules Regarding the Evaluation of Medical Evidence*, 2017 WL 168819, 82 Fed.
2 Reg. 5844, 5858 (Jan. 18, 2017).

3 In this case, the Court finds that further development is necessary for a
4 proper determination to be made. The ALJ's decision is not supported by
5 substantial evidence. On remand, the ALJ shall reevaluate each of the medical
6 opinions, specifically addressing the persuasiveness of each in compliance with the
7 new regulations. The ALJ shall take into consideration any additional evidence
8 presented and make findings at each of the five steps of the sequential evaluation
9 process.

10 Accordingly, **IT IS ORDERED:**

11 1. Plaintiff's Motion for Summary Judgment, **ECF No. 13**, is
12 **GRANTED, IN PART.**

13 2. Defendant's Motion for Summary Judgment, **ECF No. 17**, is
14 **DENIED.**

15 3. The matter is **REMANDED** to the Commissioner for additional
16 proceedings consistent with this Order.

17 4. An application for attorney fees may be filed by separate motion.

18 The District Court Executive is directed to file this Order and provide a copy
19 to counsel for Plaintiff and Defendant. Judgment shall be entered for Plaintiff and
20 the file shall be **CLOSED.**

21 **IT IS SO ORDERED.**

22 DATED July 27, 2020.



A handwritten signature in black ink, appearing to read "M", is written over a horizontal line.

JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE